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# In the Supreme Court of the United States

OCTOBER TERM, 1997

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NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
PETITIONERS

*v.*

KAREN FINLEY, ET AL.

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*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONERS

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## REPLY BRIEF FOR THE PETITIONERS

In our opening brief, we explain that the court of appeals erred, for three fundamental reasons, in holding that Section 5(d)(1) of the National Foundation on the Arts and Humanities Act (NFAH Act), 20 U.S.C. 954(d)(1), is unconstitutional on its face. First, the court of appeals misinterpreted Section 5(d)(1) to impose a rigid and inflexible test for public arts funding, rejecting out of hand the National Endowment for the Art's (NEA's) interpretation and implementation of the statute. Gov't Br. 20-25. Second, the court of appeals erred in subjecting the NEA grant program to First Amendment principles drawn from completely different contexts. *Id.* at 26-45. Third, the court of appeals erroneously concluded that Section 5(d)(1) is unconstitutionally vague, extending to the NEA funding context constitutional principles governing direct regulation of speech and forum access. *Id.* at 45-50. In taking issue with those points, respondents and their amici ask this Court to place extraordinary restrictions on Congress's traditional power to grant subsidies on a selective basis according to its conception of the public interest.

### 1. Respondents Are Wrong In Contending That The NEA's Interpretation Of Section 5(d)(1) Is Incorrect And Does Not Affect The Constitutional Inquiry

Respondents argue that Section 5(d)(1) "explicitly requires that 'standards of decency and respect for diverse values are considered when judging the artistic merit and excellence of an application.'" Resp. Br. 18-19 (quoting Pet. App. 8a). Thus, like the court of appeals, respondents and their amici rest their constitutional challenges on the premise that Section 5(d)(1) can be implemented in only one way—by "examin[ing] each grant application to determine if it comports with 'general standards of decency' and shows 'respect for diverse beliefs and values.'" Pet. App. 17a. That premise is incorrect, and embracing it inevitably distorts the constitutional inquiry.

a. Section 5(d)(1) directs the NEA to judge grant applications on the criteria of "artistic excellence and artistic merit," but it also provides that the NEA's procedures shall "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. 954(d)(1). Section 5(d)(1) does not state *how* the NEA should ensure that such "considerations" are incorporated into its evaluation process. The NEA has concluded that the statutory mandate can be satisfied by broadening the composition of its advisory panels to include a diverse array of artists and non-artists, reflecting a wide range of geographical and cultural perspectives, whose recommendations will necessarily embody their diverse experiences, perspectives, values, and beliefs. See Gov't Br. 23-25.

Respondents contend that the NEA's interpretation is "contrary to the statute's plain language" Resp. Br. 18. But Section 5(d)(1) nowhere states that the NEA must specifically apply "decency and respect" criteria to each individual application. Respondents' contrary argument (Resp. Br. 19 n.17) reads the words apart from their context and treats Section 5(d)(1) as less than a complete sentence.[1] Section 5(d)(1) is most sensibly read to direct that, when the Chairperson *establishes regulations and procedures*, she must ensure that: (a) applications are judged on the basis of artistic excellence and merit; and (b) "general standards of decency and respect for the diverse beliefs and values of the American public" are "tak[en] into consideration." Section 5(d)(1) gives the NEA considerable

[1] The NFAH Act requires the Chairperson to establish "regulations and procedures" for reviewing grant applications. NFAH Act § 5(d), 20 U.S.C. 954(d). Section 5(d)(1) supplements that requirement by stating:

> In establishing such regulations and procedures, the Chairperson shall ensure that * * * artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. 954(d)(1) (dash and paragraph number elided).



discretion to determine how to fulfill that obligation, and its chosen method of implementation rests on a permissible construction of the statute. *E.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 184 (1991). See Gov't Br. 21-22.

Respondents also err in contending (Resp. Br. 19) that the NEA's interpretation of Section 5(d)(1) to permit that approach is invalid because it is "redundant" of Congress's direction, in Section 10(c) of the NFAH Act, that the NEA employ diverse advisory panels. See 20 U.S.C. 959(c). As we note in our opening brief (Gov't Br. 24), the NEA's efforts to create diversely composed advisory panels go beyond what Congress required in Section 10(c). In any event, Section 5(d)(1) directs the NEA only to "ensure" that the stated factors are taken into consideration, and the NEA would satisfy Section 5(d)(1) if mere compliance with Section 10(c) "ensured" that result.[2]

b. Respondents contend that the NEA's interpretation "does not obviate the need to address the constitutional issues." Resp. Br. 16. They offer no persuasive reason why that is so. The government is entitled to fund art on the basis of a broadly based public assessment of artistic excellence and merit. Respondents do not assert that the NEA's use of diversely composed advisory panels to achieve *that* result violates the First Amendment. The NEA has further concluded that the collective judgment of

[2] Respondents contend that "the government's interpretation flies in the face of the clause's legislative history." Resp. Br. 20. They rely, however, on two ambiguous floor statements by one Representative. See *ibid*. Those statements are not necessarily inconsistent with the NEA's interpretation. In any event, the statements of other Representatives support the NEA's view that Section 5(d)(1) can be satisfied through procedural reforms. See Gov't Br. 24-25 & n.7. Respondents also rely on the minutes of a December 1990 meeting of the NEA National Council on the Arts in which the agency conducted preliminary discussions over how to implement Section 5(d)(1). Resp. Br. 20. The quoted passage, which suggested that advisory panel members could "bring their own definitions of these terms 'to the table,'" described the NEA's ongoing deliberations and did not state a formal and inalterable policy for implementing the provision.

diversely composed advisory panels also adequately "tak[es] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. 954(d)(1). The NEA's determination that a concededly constitutional advisory panel process satisfies those additional statutory provisions cannot render the otherwise constitutional process unconstitutional on its face.

**2. Section 5(d)(1) Is Fully Consistent With The First Amendment**

Respondents and their amici rest their First Amendment challenge on two basic premises. First, they contend that Section 5(d)(1) necessarily dictates impermissible "viewpoint discrimination" in awarding grants. Resp. Br. 21-22, 23-28. Second, they contend that the First Amendment does not allow the government ever to take account of viewpoint in its funding decisions, except in the narrow circumstances in which the government is itself the speaker. *Id.* at 22, 28-41. Neither contention is correct.

a. Respondents assert that Section 5(d)(1) "expressly disfavors private speech that fails to 'respect' the American public's 'beliefs and values' or offends its 'standards of decency.'" Resp. Br. 21. They further argue, on that basis, that Section 5(d)(1) is "a paradigmatic example of viewpoint discrimination." *Id.* at 23. Those statements rest on inaccurate characterizations of Section 5(d)(1).

First, Section 5(d)(1) does not expressly prohibit or disfavor funding of any proposal because of the viewpoint the proposal might convey. It merely directs the NEA to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. 954(d)(1). Assuming arguendo that that language must be applied to each individual grant application, it would merely require that those factors be "tak[en] into consideration" in the review process; it



would not require the NEA to give those factors any particular—much less controlling—effect.[3]

Second, Section 5(d)(1) does not require "viewpoint discrimination" as that concept is used in First Amendment jurisprudence. Even if the Court were to conclude that the challenged language must be applied on a grant-by-grant basis, it would not implicate the First Amendment's proscription against government suppression of unpopular perspectives or "dangerous ideas" (Resp. Br. 23). Reference to "general standards of decency," for example, is properly understood as a factor relating to the mode or form of art, rather than as a standard by which any intended or perceived message of the artist is judged. Gov't Br. 39-41; Cf. New School Amicus Br. 20 (NEA may consider whether a work is "too loud or too ugly").

This Court does, of course, carefully scrutinize challenges to government *regulation* of the form or mode of expression, because restrictions on the use of certain

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[3] Even in those limited situations in which "decency" and "respect" could be said to have any distinct meaning in the arts context (one can hardly imagine, for example, applying those terms to most musical works, landscape paintings, etc.), the NEA is under no obligation to "disfavor" art that is "indecent" or "disrespectful." See p. 15, *infra*. Section 5(d)(1) does not prohibit the NEA from funding any proposal that satisfies the ultimate test of "artistic excellence and artistic merit." Even those commentators who have questioned the wisdom of Section 5(d)(1) have recognized that the statutory provision has limited force. See K. Sullivan, *Artistic Freedom, Public Funding, and the Constitution*, *in* Public Money and the Muse 80, 94-95 (S. Benedict ed., 1991) ("The 1990 reauthorization legislation * * * did include some hortatory language urging the NEA chair to 'take into consideration . . . respect for the diverse beliefs and values of the American public.' This language is unlikely to be struck down on its face because, although vague, it has no teeth."); accord R. O'Neil, *Artistic Freedom and Academic Freedom*, Law & Contemp. Probs., Summer 1990, at 177, 187. In this litigation, respondents and their amici adopt an extreme and unwarranted interpretation of Section 5(d)(1), contrary to their own interests, to bolster the prospects that the Court might declare the statute unconstitutional. The Court should reject that litigation tactic and instead follow its settled practice of construing Acts of Congress in a manner that avoids unnecessary constitutional issues. See Gov't Br. 20.

modes, including "indecency," may affect the expressive force or impact of speech. See *Cohen* v. *California*, 403 U.S. 15, 26 (1971); *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2415-2416 (1996) (Kennedy, J., concurring). But contrary to the suggestions of respondents and their amici (see Resp. Br. 24-26 & n.25; Rockefeller Foundation Amicus Br. 19-24), that does not mean that "decency" regulation should be regarded as a form of impermissible viewpoint discrimination. See *Denver Area*, 116 S. Ct. at 2399 (Stevens, J., concurring). To the contrary, as Justice Stevens observed in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978): "A requirement that indecent language be avoided will have its primary effect on the *form*, rather than the *content*, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Id.* at 743 n.18 (plurality opinion) (emphasis added).

Respondents' contrary view rests on a misunderstanding of this Court's decisions addressing when the government may impose "decency" restrictions. See *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681-686 (1986); *Board of Educ.* v. *Pico*, 457 U.S. 853, 871 (1982) (plurality opinion); *Pacifica*, *supra*; see also *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 83 (1983) (Stevens, J., concurring). Respondents seem to believe that those decisions rest on a rationale that decency regulations are an allowable species of viewpoint regulation in certain "limited" situations where children are involved and where the government has a "legitimate inculcative function." Resp. Br. 25 n.25.

The reasoning in *Bethel*, *Pico*, and *Pacifica* does not rest on notions that "decency" restrictions can sometimes be upheld as a permissible type of "viewpoint" prohibition; indeed, in each of those cases the Court distinguished decency from viewpoint. Gov't Br. 40-41 & n.14. Rather, the reasoning in those cases rests on the different proposition that a mode of expression—be it profanity, vulgarity, loudness, or some other aspect of the expression—may play



"no essential part of any exposition of ideas," *Bethel*, 478 U.S. at 685 (quoting *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942)), and the government may therefore regulate those aspects of communication where sufficiently important countervailing societal interests are at stake. See *ibid.*; *Pico*, 457 U.S. at 871 (plurality opinion); *Pacifica*, 438 U.S. at 746 (plurality opinion). While the Court has most frequently applied that principle in the context of protecting children, it has never suggested that no other societal interest could justify restrictions on the mode or form of speech. See *Bolger*, 463 U.S. at 84 (Stevens, J., concurring) ("regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment").

Moreover, the Court has been attentive to the character of the challenged government activity when weighing the interests at stake. Significantly, the Court has forbidden the government from imposing indecency restrictions in precisely those situations in which the government may not draw distinctions among speakers based on governmental judgments about the excellence or merit of their expression. See *Reno* v. *ACLU*, 117 S. Ct. 2329 (1997) (Internet); *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989) (telecommunications); *Cohen* v. *California*, *supra* (public building). The NEA, by contrast, concededly *may* take the excellence or merit of the expression into account and, therefore, may consider decency as an aspect of that criterion.

In this case, of course, the government does not seek to regulate "indecent" expression at all. The only question is whether the NEA may "tak[e] into consideration" the mode of expression when evaluating applications to receive public funding. Cf. *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 270-271 (1988). Given the broad scope of the NEA's grant program and the wide variety of interests that may be implicated (including but not limited to interests relating to the education of children and the

public at large), it would be astounding to conclude that the NEA—which is otherwise *required* to take content into account in reviewing grant applications—could not even "consider" matters of decency.

Similarly, there is no merit to respondents' assertion that Section 5(d)(1)'s directive that the NEA take into consideration "respect for the diverse beliefs and values of the American public" mandates prohibitions based on viewpoint. That provision can reasonably be understood to *expand* the concepts of artistic excellence and artistic merit to include consideration of the full range of aesthetic values and preferences present in American culture. See Gov't Br. 42-43. If this Court concludes that the challenged provision of Section 5(d)(1) must be applied to individual grant applications, then the NEA can fulfill that mandate by considering whether the particular proposals adequately address the artistic needs, interests, and aspirations of the communities that will be served or convey a cultural perspective that has *not* been reflected in past projects. Such judgments, which manifest "respect for the diverse beliefs and values of the American public," do not in any meaningful sense result in invidious viewpoint discrimination.

Respondents reply to that point primarily by arguing that Section 5(d)(1) directs that "only 'disrespect' is adversely considered" (Resp. Br. 24 n.22)—that the statute "directs the NEA to disfavor art *precisely* when the agency understands it to convey a particular message—one of disrespect for American values" (*id.* at 36). Respondents, however, have simply assumed their conclusion. Section 5(d)(1) does not require the NEA to "adversely consider" artwork that demonstrates "disrespect" for any particular subset of the beliefs and values that exist in American culture. It merely directs the NEA to take into consideration "respect for the *diverse* beliefs and values of the American public." 20 U.S.C. 954(d)(1) (emphasis added). The NEA can fulfill



that directive without necessarily denying funding to what respondents describe as "disrespectful" art.

Respondents argue that the government's construction of Section 5(d)(1) is "ludicrous," but they base that dismissive characterization on nothing more than misleading snippets of legislative history. Resp. Br. 24 & n.23. The legislative record shows that Congress enacted Section 5(d)(1) in lieu of other legislative proposals for reforming the NEA grant program specifically because it did *not* impose the sort of funding prohibition based on viewpoint that respondents discuss.

As we explain in our opening brief (Gov't Br. 7-8), the House of Representatives considered three alternatives for reform of the NEA funding process: (a) the Crane proposal, which would have virtually eliminated individual NEA funding decisions; (b) the Rohrabacher proposal, which would have altogether barred NEA funding of art that denigrated "the beliefs, tenets, or objects of a particular religion" or "an individual, or group of individuals, on the basis of race, sex, handicap, or national origin"; and (c) the Williams/Coleman proposal, which ultimately became Section 5(d)(1). The House majority ultimately favored the Williams/Coleman proposal because it understood that the Rohrabacher proposal would prohibit funding based on viewpoint, but the Williams/Coleman proposal would not.[4]

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[4] Representative Rohrabacher envisioned that, under his proposal, art promoting Nazi expression and "sacr[ile]gious" art could not be funded. See 136 Cong. Rec. 28,639, 28,662 (1990). By contrast, the proponents of the Williams/Coleman proposal opposed the Rohrabacher amendment precisely because it would have imposed viewpoint-based prohibitions. They pointed out, for example, that:

> [I]f the Rohrabacher amendment is adopted, the flag series by Jasper John[s] which defaces the American flag could not be funded by NEA; a theater production of the "Merchant of Venice," which denigrates a religion, could not be funded by NEA; * * * D.W. Griffiths' classic film "Birth of a Nation" [which] denigrates a great American religion, could not be funded by the NEA.

*Id.* at 28,663 (Rep. Williams). See also *id.* at 28,624 (Rep. Coleman) (The Rohrabacher amendment would "put into legislative language

b. Respondents' entire argument in Part II of their brief is premised on the notion that Section 5(d)(1) requires invidious viewpoint discrimination. See Resp. Br. 21-41. If we are correct that Section 5(d)(1) does not compel the NEA to deny funding to particular projects on the basis of viewpoint, then there is no need for the Court to address the various points that respondents raise. We nevertheless turn to respondents' specific contentions.

(i). Relying on *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), respondents argue that the First Amendment requires viewpoint neutrality where "a government program funds a diverse range of private expression." Resp. Br. 28-29. *Rosenberger*, however, does not support respondents' position here. See Gov't Br. 27-37.

The Court ruled in *Rosenberger* that, when a University effectively establishes a limited forum for student expression, "viewpoint discrimination * * * is presumed impermissible when directed against speech otherwise within the forum's limitations." 515 U.S. at 829-830. The Court applied that principle to the University's provision of funding, stating that, while the University may impose viewpoint-based restrictions when the University "itself speak[s] or subsidize[s] transmittal of a message it favors," it may not impose such restrictions when it effectively creates a forum by expending funds "to encourage a diversity of views from private speakers." *Id.* at 834. The Court drew those distinctions for descriptive, rather than categorical purposes. Gov't Br. 27-29.

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specific activities and projects which may not receive funding by the NEA," and would "prohibit[] categories of expression."). Neither Representative Rohrabacher nor the supporters of his proposal attempted to dispel those concerns. To the contrary, Representative Rohrabacher complained vigorously that "the Williams-Coleman substitute * * * will, if passed, wipe out all the restrictions that my amendment places on NEA funding. * * * [T]he vote on the gut-the-standard Williams substitute is the key vote." *Id.* at 28,622. In short, the House enacted the Williams/Coleman proposal to avoid the very prohibitions that respondents (and their amici) now argue Section 5(d)(1) requires.



Respondents are accordingly mistaken in suggesting that *Rosenberger* establishes a stark dichotomy between "*government speech* programs and programs designed to support a diverse range of *private speech*" (Resp. Br. 29). The Court did not announce a new constitutional imperative that all government funding programs involving communicative activity must be analyzed as either supporting government speech or creating a forum for private expression, nor did it embrace the discredited notion that all First Amendment issues can be resolved through resort to mechanical rules. See *Denver Area*, 116 S. Ct. at 2384-2385 (plurality opinion). The Court did not indicate any intention to depart from its past decisions, which recognize that various types of expressive activity cannot be strictly categorized as either speech by private actors engaged in public discourse or speech by purely state actors. See *id.* at 2385.[5] Rather, the Court evaluated the case in light of the specific First Amendment interests at stake. See *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring).

Ultimately, respondents' Procrustean approach fails to give *any* account to the fact that the public also has a fundamental and constitutionally based interest in responsive representative government, including an interest in the expenditure of public funds and the nature of the artistic endeavors those funds may support. "It is precisely because we wish to use the First Amendment to establish a realm of public discourse in which persons are regarded as autonomous and self-determining that we impose strict

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[5] For example, broadcasters, university professors, and public school teachers engage in activities that, to varying degrees, involve aspects of both a private speaker and a public servant or fiduciary. See, *e.g.*, *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 198 n.6 (1990); *Hazelwood Sch. Dist.*, 484 U.S. at 270-273; *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984); *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 389 (1969); *Epperson* v. *Arkansas*, 393 U.S. 97, 113-114 (1968) (Black, J., concurring).

constitutional requirements of neutrality on state regulation of public discourse. And it is precisely because we wish our government to exemplify and to advance the particular norms of our community that we relax these requirements when the state is acting on its own account to support the nation's arts." R. Post, *Subsidized Speech*, 106 Yale L.J. 151, 192 (1996).

(ii). Respondents next contend that the government's funding must be "viewpoint neutral" because "the arts, like the academy, is a 'traditional sphere of free expression.'" Resp. Br. 30-33. Whatever the descriptive merits of this observation, it does not have particular pertinence to this case. First, even if the arts are a "traditional sphere of free expression," the First Amendment allows the government to impose standards in selecting what art proposals the public should fund. Second, even if both the academy and the arts serve the goals of free expression, that does not mean that arts funding should be subject to same First Amendment analysis as that applied in the university context. University decisions on hiring, retention, and tenure, for example, raise a set of complex and discrete First Amendment and personnel concerns that are far removed from issues related to arts funding. See, *e.g.*, *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 198-199 (1990). Finally, the academic freedom analogy does not, in any event, prove respondents' point. Whatever academic freedom means, it is not obvious that the concept is so inflexible that it would require a university publication that adopts an editorial standard of "academic excellence" to give no consideration to whether a submitted manuscript is crude or derisive. Similarly, it is not apparent that the concept is so absolute that it would require a university to be indifferent if a professor employed gratuitous profanity in the classroom or ridiculed students based on their



cultural values or religious beliefs. Cf. *id.* at 198-200 & n.7.[6]

(iii). Respondents next argue that "the government's approach would render viewpoint-discriminatory selective subsidies self-justifying" (Resp. Br. 33-34), by which they apparently mean that we have not, in their view, provided a sufficient basis, in their view, for distinguishing this case from *Rosenberger*. Their argument rests on four specific contentions. Each depends largely on a mischaracterization of the government's position, and each is unpersuasive.

First, respondents contend that "the NEA's selectivity does not justify viewpoint discrimination." Resp. Br. 34-35.[7] The NEA does not, however, rely on selectivity to "justify viewpoint discrimination." The NEA uses a competitive process, employing congressionally prescribed criteria of artistic excellence and artistic merit, to determine which art funding requests should receive federal grants. The funding program is not designed to facilitate the exchange of private views (*i.e.*, to create a forum), but rather to select from among many proposals a limited number that the NEA itself determines, through assess-

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[6] See also *Dambrot* v. *Central Michigan Univ.*, 55 F.3d 1177, 1190-1191 (6th Cir. 1995) (university coach dismissed for using racial epithets as a "motivational tool"); *Bishop* v. *Aronov*, 926 F.2d 1066, 1076-1077 (11th Cir. 1991) (professor disciplined for deviating from university-prescribed curriculum to promote personal religious beliefs), cert. denied, 505 U.S. 1218 (1992); see also *Hetrick* v. *Martin*, 480 F.2d 705, 709 (6th Cir.), cert. denied, 414 U.S. 1075 (1973); *Clark* v. *Holmes*, 474 F.2d 928, 931 (7th Cir. 1972), cert. denied, 411 U.S. 972 (1973).

[7] Respondents concede that the NEA program "is selective," but they assert that it is not "highly selective" because the NEA historically awarded grants to two out of every seven applicants (including both individuals and organizations) and recently awarded grants to 35% of the organizations that applied. Resp. Br. 3-4, 34. Respondents do not mention that, when appropriations have been available for individual grants (such as respondent Finley received), the NEA has awarded such grants to less than 5% of the individual applicants. See Pet. App. 29a (Kleinfeld, J., dissenting).

ment of their content, best demonstrate "artistic excellence and artistic merit" and therefore warrant federal financial support. Gov't Br. 32-33, 35-36. The NEA's selection process should not be evaluated under principles that are designed to ensure that the government does not improperly restrict access to a forum for the free exchange of ideas. See *Rosenberger*, 515 U.S. at 829-830.

Second, respondents contend that "art is entitled to no less protection against viewpoint discrimination than other forms of speech." Resp. Br. 36-37. Contrary to respondents' assertions, we have not argued otherwise. See Gov't Br. 19, 30. The question here is not whether the NEA funding program constitutes government speech, subsidizes transmittal of a specific message the government favors, or creates a forum—it does none of those things—but instead whether Section 5(d)(1) is consistent with the First Amendment's core function of protecting individual freedom of expression. *Id.* at 37-45. We submit that Section 5(d)(1) does not harm any First Amendment value. Specifically, it does not result in invidious discrimination aimed at "the suppression of dangerous ideas." *Rust*, 500 U.S. at 192, 194; *Rosenberger*, 515 U.S. at 834; see *Regan* v. *Taxation with Representation*, 461 U.S. 540, 548 (1983).

Third, respondents contend that "the First Amendment does not require an empirical showing that government regulation has skewed the marketplace of ideas." Resp. Br. 37-39. We have not argued, however, that to establish a First Amendment violation one must always show a distortion of the marketplace of ideas. We simply recognize that a funding program is not wholly immune from First Amendment scrutiny and that the Court would be faced with a different case "if government funding manipulates or skews the 'marketplace of ideas' in a way that monopolizes the opportunity for free expression or effectively suppresses the communication of disfavored viewpoints." Gov't Br. 38 n.12; see also *id.* at 47 n.21. That is certainly not the case here. See Post, *supra*, 106 Yale L.J. at 192-194 & n.208; D. Shapiro, *Free Speech and Art Subsidies*, 14 Law & Phil. 329, 341-345 (1995).[8]



Fourth, respondents argue that "the First Amendment prohibits viewpoint-based criteria without regard to whether they operate as absolute bars to funding or negative factors to consider." Resp. Br. 39-41. The short answer, of course, is that Section 5(d)(1) simply does not require viewpoint discrimination in the sense that this Court has previously addressed, involving the suppression of ideas the government finds dangerous. But more fundamentally, there *is* a real difference between disqualifying factors and relevant considerations. Section 5(d)(1)'s identification of relevant considerations does not prevent anyone from receiving a federal subsidy, much less abridge any protected speech. See Independent Comm'n, *A Report to Congress on the National Endowment for the Arts* 89 (Sept. 1990) ("While a work of meager artistic quality should be disallowed because of inappropriateness for public funding, a work of great importance might warrant funding despite the same qualities of inappropriateness.") (quoting Prof. Michael McConnell).[9]

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[8] Respondents assert that an NEA grant for a particular art project may precipitate additional private financial support (Resp. Br. 37-38). That incidental consequence, however, would not amount to manipulating or skewing the marketplace of ideas. The NEA's decision to provide federal funding to a particular art project cannot be held to violate the First Amendment merely because private donors might make voluntary decisions to provide additional contributions.

[9] This case thus does not raise the central problem that was present in *Rosenberger*, where the University simultaneously created a forum "to encourage a diversity of views from private speakers" and at the same time "silence[d] the expression of selected viewpoints" within that forum. 515 U.S. at 834, 835. Contrary to the extreme characterization of respondents and their amici (see, *e.g.*, Resp. Br. 23, 28, 47 n.48), Section 5(d)(1) does not, on its face, silence or chill a speaker from engaging in free expression in any identifiable forum. An applicant remains free to engage in whatever artistic expression he wishes in whatever forum he chooses; he simply cannot dictate the standards by which his application for federal assistance will be judged.

The First Amendment provides that Congress shall make no law "abridging the freedom of speech." That freedom is presumptively "abridged" when Congress directly regulates private speech, or limits access to a forum it has established for free private expression, on the basis of content or viewpoint. But government subsidies, like private donations, *expand* the opportunity for private expression. Absent more (and no more is present here), they do not "abridge" the freedom of speech of those persons who are not subsidized.

**3. Section 5(d)(1) Is Not Void For Vagueness**

Respondents also contend that Section 5(d)(1) violates constitutional principles that prohibit vague proscriptions on expressive conduct. Resp. Br. 41-48. Respondents are unable to point to any situation, however, in which this Court has applied the "void for vagueness" doctrine to a federal grant program. Indeed, respondents' proposed principles are so broad as to suggest that even Section 5(d)(1)'s standard of "artistic excellence and artistic merit" would be vulnerable to a vagueness attack.

a. Respondents contend that "the government cites no precedent for its view that statutes are exempt from vagueness scrutiny unless they are coercive." Resp. Br. 42. That, however, is not what we argue. We contend only that the vagueness doctrine does not apply to congressional funding limitations, Gov't Br. 45-46, and it is *respondents* who can cite no precedent from this Court to the contrary.

Respondents rely on cases in which the Court invalidated government regulation of political speech as a condition of employment, *Keyishian* v. *Board of Regents*, 385 U.S. 589, 596, 597, 601 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360, 361, 364 n.3, 374 (1964); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961), and government regulation of access to a forum, *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 130-133 (1992); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-759, 769-772 (1988); *Board of Airport Comm'rs* v. *Jews for Jesus, Inc.*,



482 U.S. 569, 570-571, 574-576 (1987). None of those cases involved a challenge to congressional limitations on a government grant program, and none presented a situation analogous to the one found here.

Respondents' inability to discover relevant precedent is not surprising. This Court developed the vagueness doctrine to address distinct problems that arise from government *regulation* of expressive conduct. The Court made that point in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972)—the case on which the court of appeals based its decision—where it explained that the vagueness doctrine rests on the concern that vague proscriptions on expressive conduct may (1) "trap the innocent by not providing fair warning"; (2) allow "arbitrary and discriminatory enforcement"; and (3) thereby "inhibit the exercise of [First Amendment] freedoms." *Id.* at 108-109. See Gov't Br. 46. That reasoning explains the cases that respondents cite.

The Court's decisions in *Keyishian*, *Baggett*, and *Cramp* reflect concern that the state statutes at issue could subject innocent public employees to sanctions for their private speech or association without fair warning, while the Court's decisions in *Forsyth County*, *City of Lakewood*, and *Board of Airport Commissioners* illustrate situations in which local ordinances could result in arbitrary denial of access to a forum.[10] Section 5(d)(1), by contrast, neither proscribes nor punishes expressive conduct nor denies a speaker use of a forum. It simply prescribes selection criteria for the award of federal grants. Those criteria can neither "trap the innocent" nor result in an "arbitrary" denial of a right to participate in the open discourse of a forum.

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[10] The latter three cases each arose in contexts in which government actors are completely prohibited from considering content. See, *e.g.*, *Forsyth County*, 505 U.S. at 130-131. Here, by contrast, the NEA provides subsidies on a competitive basis through the application of criteria that must *necessarily* take account of the content of the artists' proposals. See also p. 7, *supra*.

Respondents must ultimately retreat to the bare assertion that Section 5(d)(1)'s lack of precision will "chill excessive amounts of protected speech." Resp. Br. 44. This Court, however, has already rejected the premises underlying that argument. See Gov't Br. 47.[11]

b. Respondents' vagueness challenge also suffers from a fatal inconsistency. They contend that Section 5(d)(1)'s references to "general standards of decency" and the "diverse beliefs and values of the American public" are unconstitutionally vague, but Section 5(d)(1)'s reference to "artistic excellence and artistic merit" is not. Resp. Br. 44-47. According to respondents, the latter standard is sufficiently precise because it "relies upon a common core of professional expertise." *Id.* at 44.

Respondents' distinction rests on nothing more than their own particular opinion about who knows best what is "excellent" art. That opinion is certainly debatable.[12] Ultimately, there is little basis for saying that Congress's reference to "artistic excellence and artistic merit" is more objective or less "indeterminate" (Resp. Br. 46) than its references to "general standards of decency" and the "diverse beliefs and values of the American public." The

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[11] As we explain in our opening brief, if an applicant has no constitutional right to receive federal funding to communicate his views, and the government's denial of funding does not, as a matter of constitutional law, impose a penalty on his right of free expression, then it is far-fetched to suggest that the Constitution nevertheless requires the government to articulate specific funding criteria to avoid "chilling" the applicant's speech. See Gov't Br. 47. See also note 13, *infra*.

[12] As respondents acknowledge, art professionals frequently disagree over the merits of a particular work. Resp. Br. 46. Indeed, history is replete with examples of artists whose work was rejected by contemporary art "professionals" but embraced by those of another age, as well as examples of artists whose work enjoyed contemporary but fleeting acclaim. There is nothing illegitimate in the view that "it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can." *Pope* v. *Illinois*, 481 U.S. 497, 504 (1987) (Scalia, J., concurring).



NEA has recognized that all of Section 5(d)(1)'s provisions entail imprecise and arguably subjective judgments, and it has properly attempted to implement all of those provisions through the use of diversely composed advisory panels, composed of both artists and non-artists, that will ensure that the NEA's funding decisions are based on a broad public perspective. Respondents urge, by contrast, that the Constitution requires that Congress allow for consideration only of "artistic excellence and artistic merit," without elaboration, and that it must rely solely on art "professionals" in determining what art the public may fund.

The difference in perspectives is significant. The NEA's approach is consistent with the language of Section 5(d)(1) and it ensures, in accordance with the purposes of the Act, that the NEA's funding decisions are "sensitive to the nature of public sponsorship" and "contribute to public support and confidence in the use of taxpayer funds." See NFAH Act § 2(5), 20 U.S.C. 951(5). Respondents' approach would minimize the public's participation in the application selection process and would subject the NEA grant program to a "professional" orthodoxy.[13]

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[13] Respondents raise the additional argument, not relied upon by the court of appeals, that Section 5(d)(1) creates an unconstitutional condition by "conditioning eligibility for an NEA grant on a consideration of whether applicants have produced 'indecent' or 'disrespectful' art on their own time and with nonfederal funds." Resp. Br. 48-49. That argument has no basis in law or fact. Section 5(d)(1) *allows* the NEA to consider a grant applicant's past work in evaluating whether the proposed work could be expected to demonstrate "artistic excellence and artistic merit," but the NEA examines only those work samples that the applicant elects to submit. See NEA FY 1999 *Grants to Organizations: Application Guidelines* 28, 31-40 (Dec. 1997). Neither Section 5(d)(1) nor the NEA's review process conditions an applicant's eligibility for a grant on "whether applicants have, in the past, produced 'indecent' or 'disrespectful' art." *Id.* at 49. There is accordingly no merit to respondents' suggestion that Section 5(d)(1) "effectively prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust*, 500 U.S. at 197.

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For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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